

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:)	
)	
Irene Deschenes, Plaintiff)	
)	Loretta P. Merritt, for the plaintiff
)	
)	
Plaintiff)	
)	
– and –)	
)	
Pauline Lalonde as Estate Trustee with a)	
Will (“Executrix”) of the Estate of Charles)	
H. Sylvestre, the Roman Catholic Episcopal)	Adam J. Stephens, for the defendants The
Corporation of the Diocese of London in)	Roman Catholic Episcopal Corporation of
Ontario, the Estate of John Christopher)	the Diocese of London, Ontario, John
Cody, the Estate of Gerald Emmett Carter,)	Michael Sherlock and Anthony Daniels
John Michael Sherlock, St. Clair Catholic)	
District School Board, the Sarnia Police)	
Force, John Smith, J. Torrance, Le Conseil)	
Scolaire de District des Ecoles Catholiques)	
du SudOuest, the Sisters of Charity of)	
Ottawa (also known as Grey Nuns of the)	
Cross – “Soeurs Grises de la Croix”) and)	
Anthony Daniels)	
)	
Defendants)	
)	
)	
)	HEARD: September 26, 2018

ASTON J.

[1] There are two summary judgment motions before the court. The defendants’ motion is to dismiss the plaintiff’s action on the basis that it is barred by the Full and Final Release (the “Release”) she signed in 2000 on the settlement of her earlier identical claims. The plaintiff’s motion is for a declaration rescinding or setting aside the Release and the related order giving effect to that settlement. She also seeks summary judgment on the issue of liability, leaving damages as the only outstanding issue. The underlying facts

and law are common to each motion. They were argued together. One motion must fail and the other must be granted.

- [2] There is a well-established public policy argument favouring finality in litigation. That policy encompasses cases that are settled. Settlements involve compromise, risk management and non-financial considerations. It is not enough to revisit a settlement decision based on the better vision of hindsight. A settlement and final disposition of the prior litigation ought to be respected and upheld unless there is a compelling reason to set it aside. Settlement agreements and associated releases ought to be enforced unless enforcement would create a real risk of injustice. See *Tsaoussis (Litigation Guardian of) v. Beatz*, 1998 CanLII 5454 (ONCA) at paras. 15-16; *Ruder v 1049077 Ontario Ltd.*, 2014 ONSC 4389 at para. 6; and *Radhakrishnan v. University of Calgary Faculty Association*, 2002 ABCA 182 at paras. 49 and 52-54.
- [3] The plaintiff, now 57 years old, grew up in Chatham. At all material times, she was a student and parishioner at St. Ursula Catholic School and St. Ursula's parish in Chatham. St. Ursula's parish falls within the jurisdiction of the defendant Diocese. By a Private Act of the legislature dating back to 1873, the Bishop of London is a "body corporate". The Bishop has complete responsibility for the Diocese, including the care of the faithful within its territory and oversight of its clerics.
- [4] The defendant, Charles Sylvestre, was an ordained priest from 1948 until his retirement in 1993. He was appointed to quite a number of different geographic locales, mainly in Southwestern Ontario, including an appointment as Pastor at St. Ursula's parish from March 1968 to June 1980. In August 2006, Father Sylvestre pleaded guilty to historical sexual assaults on 47 separate victims, all girls under the age of 18. The dates of the offences cover the time span September 1952 to June 1986. Father Sylvestre's convictions included a count in which he pleaded guilty to assaulting the plaintiff between September 1970 and December 1973.
- [5] The plaintiff initiated her original action for damages in July 1996. In that proceeding the Diocese denied liability, asserting specifically that it had no direct, indirect, actual or constructive knowledge of the alleged sexual propensities or acts of Sylvestre prior to the sexual assaults against the plaintiff. The Diocese denied that it failed to properly supervise Sylvestre. It asserted that actual or constructive knowledge of any allegations of sexual assault by Sylvestre only came to light after 1989, well after the assaults on the plaintiff had already ceased.
- [6] In the original litigation, Father Anthony Daniels (now Bishop Daniels) was the designated legal representative for the Diocese. He is the affiant for the Affidavit of Documents of the Diocese in the original action and gave oral evidence on an examination for discovery held January 12, 2000. His evidence, at that time, was that he

had conducted a search of records and had made diligent inquiries to determine when the Diocese first learned about allegations against Father Sylvestre. He confirmed what the Diocese had pleaded in its statement of defence, namely that “no one had any idea at the time” of the offences against the plaintiff. In the subsequent mediation in September 2000, the Diocese stated in its brief “there were never any complaints about Father Sylvestre, or reason to believe there could be any problems with him or his behaviour prior to 1989 when a fellow priest raised concerns with the Bishop about possible alcohol abuse by Father Sylvestre. He was immediately removed from the parish where he was then serving, and sent to a treatment centre”.

[7] Shortly after that mediation session, the parties settled the plaintiff’s claim. The terms of settlement included:

- a) a payment to the plaintiff of \$100,000;
- b) a payment by Sylvestre to the Diocese of \$50 per month during his lifetime as a contribution towards the \$100,000 paid by the Diocese;
- c) a full and final release from the plaintiff in favour of both Father Sylvestre and the Diocese; and
- d) an order dismissing the original action.

[8] Six years later it came to light that on January 17, 1962 three 11-year-old girls, in the company of their parents, gave statements to the Sarnia Police Service alleging that they had been sexually assaulted by Father Sylvestre. Written witness statements were signed. The police took no action but did provide copies of the statements to the local church, part of the Diocese of London though not part of St. Ursula’s parish. They were thereafter forwarded to Bishop Cody, who died of a sudden heart attack in December 1963, apparently without telling anyone about the police reports.

[9] Bishop Anthony Daniels (once again the designated legal representative for the Diocese) provided affidavit evidence on these motions and was cross-examined concerning the discovery and disclosure of the 1962 police interview summaries. He confirms that the police statements were received by Monsignor Cook who forwarded them to the Diocese, to Bishop Cody. He also confirms that the same month Sylvestre was sent to Roxboro, Quebec, but he has no knowledge that it was to avoid arrest or even that the transfer was causally connected to the allegations.

[10] The circumstances of the discovery of the police interview summaries by Bishop Fabbro’s executive assistant 44 years after they were received are set out in her letter of December 1, 2006. Correspondence had been misfiled with old accounting records.

Once discovered in 2006, the police interview summaries were immediately sent to all lawyers representing plaintiffs with outstanding claims related to Father Sylvestre, including Ms. Legate who acted for the plaintiff in her original claim and who was acting for other plaintiffs with outstanding claims.


- [11] The plaintiff's original claim asserted both negligence on the part of the Diocese and vicarious liability for Father Sylvestre's conduct as the basis of liability. Actual or constructive knowledge on the part of the Diocese was an essential element of the negligence claim. When the claim was first issued, the plaintiff's vicarious liability claim was problematic as a question of law. An employer was generally only vicariously liable if the employee's conduct was connected to employment duties and responsibilities, that is to say, within the scope of the person's employment. Claims against non-profit organizations were even less likely to succeed.
- [12] The parties agree the plaintiff's damages are the same whether founded on negligence or vicarious liability. This is critical to the defendant's position on its present motion. It submits the June 1999 decision of the Supreme Court of Canada in *Bazley v. Curry*, [1999] 2 S.C.R. 534 effectively established the liability of the Diocese to the plaintiff on the basis of vicarious liability. Prior knowledge from the 1962 police reports is only relevant to whether a negligence claim could succeed. The Diocese therefore submits the police reports are not "material" to the settlement (which was based on vicarious liability) because the settlement reflects the same damages the plaintiff would have received based on negligence as her cause of action.
- [13] The plaintiff, and her original lawyer Ms. Legate, both assert that the plaintiff would not have settled as she did in the fall of 2000 if they had known about the 1962 police reports. The plaintiff's position is that the representation by the Diocese that it had no knowledge of Sylvestre's sexual abuse until 1989 constitutes a misrepresentation of a material fact that the plaintiff relied on in settling her claim. If that is so, rescission is an available discretionary remedy, even if the misrepresentation was innocently made. However, the misrepresentation must be "material", "substantial" or "go to the root of the contract". See *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] S.C.J. No. 60 at para. 47. On the question of whether the plaintiff relied on the misrepresentation, she does not need to prove it was the sole reason for her decision to settle, only that it was an influential part of that decision. See *Buccilli v. Pilliteri*, [2012] O.J. No. 5628 at paras. 173-175; *aff'd* [2004] O.J. No. 2561 (C.A.).
- [14] I agree with the plaintiff that the misrepresentation in this case cannot be regarded as an "innocent misrepresentation" as the law defines it. I do not question the veracity of Father Daniels when he stated under oath in 2000 that he had done a diligent search of Diocese records and found nothing to alert the Diocese to Sylvestre's sexual abuse of

young girls before it came to light after 1989. However, the Diocese is a corporate body. Father Daniels did not know about the police reports sent to the Diocese in 1962, but Bishop Cody did. As counsel for the plaintiff aptly puts it, “Father Daniel’s ignorance of those police reports in 2000 is not the ignorance of the Diocese because Bishop Cody’s knowledge in 1962 or 1963 is the knowledge of the Diocese”.

- [15] For the same reason, the misrepresentation cannot be considered a mutual or common mistake. Rather it is a unilateral mistake by the Diocese.
- [16] Was the unilateral mistake of the Diocese “material” to the settlement and relied upon by the plaintiff?
- [17] There is no question that *Bazley v. Curry* was a landmark case in extending vicarious liability to non-profit organizations. The intervenors in that case included the Canadian Conference of Catholic Bishops, the United Church of Canada and the General Synod of Anglican Church of Canada. The actual defendant in the case was a non-profit organization operating residential care facilities for the treatment of emotionally troubled children. Its employees acted as substitute parents, from general supervision to intimate duties like bathing and tucking in children at bedtime. In finding the employer vicariously liable for the sexual abuse of the plaintiff the court relied on the fact that the employer’s enterprise fostered the risk that led to the ultimate harm. In the companion case, *Jacobi v Griffiths*, [1999] 2 S.C.R. 570 – released the same day by the Supreme Court of Canada – the court did not impose vicarious liability when the only evidence was in relation to sexual assaults off-site and outside working hours. The court directed a new trial in *Jacobi*, with fresh evidence and the application of the new legal test it articulated in *Bazley*.
- [18] In *John Doe v Bennett*, [2000] N.J. No. 203 thirty six plaintiffs were successful at trial in establishing the vicarious liability of the Diocese and three of its bishops for sexual abuse inflicted by a priest. The court applied the law from the *Bazley* and *Jacobi* cases in arriving at that result. The decision predates the settlement of the plaintiff’s claim in this case by about two months. However, the finding of vicarious liability was appealed by the church and only affirmed by the Supreme Court of Canada in March 2004, more than three years after the settlement in this case.
- [19] The decisions in *Bazley* and *Bennett* provided the plaintiff in this case with strong precedents in her favour, but not necessarily decisive precedents.
- [20] Counsel for the Diocese indicated informally in 1999 that the Diocese would be accepting liability on the basis of vicarious liability but it never did so formally. A review of the January 2000 discovery transcript, coupled with the denial of vicarious liability in the mediation brief of the Diocese in September 2000 and the fact that the

issue long after *Bazley*. More to the point, the vicarious liability of the Diocese in this case was not a certainty in the settlement with the plaintiff.

- [21] In her emailed instructions to her lawyer accepting the defendant's settlement offer on September 22, 2000, the plaintiff stated "we are tired, we want closure, and are hesitant to believe we can or will get 'justice' from the court process". There are almost always multiple reasons for the settlement of a claim. The question here is whether the unilateral mistake of the Diocese was relied upon by the plaintiff. It need not be the crux of her decision to settle, or the most influential reason. It only needs to be an important reason.
- [22] The plaintiff and her former lawyer Ms. Legate both assert on these motions that the settlement of September 27, 2000 reflected a "liability discount". Though the plaintiff's damages would be the same regardless of the cause of action, negligence or vicarious liability, they say her claim was compromised because of the apparent inability to prove prior knowledge by the Diocese as an essential element of her negligence claim and the remaining uncertainty of the law regarding vicarious liability. I accept their evidence on this point.
- [23] The failure to disclose the 1962 police reports was a material misrepresentation and it was relied upon by the plaintiff in her decision to settle as she did.
- [24] I am mindful that the evidence of Father Daniels in the original proceeding reflected an honest, albeit mistaken, belief. I am also mindful of the discretionary nature of the remedy of rescission and the public policy considerations favouring finality of settlements, referred to earlier in these reasons. On the other hand, I cannot disregard what has come to light since the settlement of the plaintiff's claim in 2000 regarding the cover-up policy of the Church in the 1960's and 70's respecting allegations of misconduct by its priests. Since then the Diocese has dramatically changed its ways in Southwestern Ontario. It has genuinely tried to make amends. However, it is still responsible for its historical conduct. There are overarching considerations of fairness and justice on these motions that favour the plaintiff. It would be wrong in the circumstances of this case to protect the settlement.
- [25] The defendants' motion is therefore dismissed. The plaintiff's motion is granted as requested. The plaintiff is entitled to costs of the motions, fixed at \$80,000 all inclusive.


Justice D. R. Aston

Released: November 27, 2018

CITATION: Deschenes v. The Roman Catholic Episcopal Corp., 2018 ONSC 7080
COURT FILE NO.: 60596
DATE: 20181127

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

Irene Deschenes, Plaintiff

Plaintiff

– and –

Pauline Lalonde as Estate Trustee with a Will (“Executrix”) of the Estate of Charles H. Sylvestre, the Roman Catholic Episcopal Corporation of the Diocese of London in Ontario, the Estate of John Christopher Cody, the Estate of Gerald Emmett Carter, John Michael Sherlock, St. Clair Catholic District School Board, the Sarnia Police Force, John Smith, J. Torrance, Le Conseil Scolaire de District des Ecoles Catholiques du SudOuest, the Sisters of Charity of Ottawa (also known as Grey Nuns of the Cross – “Soeurs Grises de la Croix”) and Anthony Daniels

Defendants

REASONS FOR JUDGMENT

Aston J.

Released: November 27, 2018